

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

76-4039

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Rose Davis, An Individual,

JUN 28 1976

Petitioner,

V.

Docket No. 76-4039

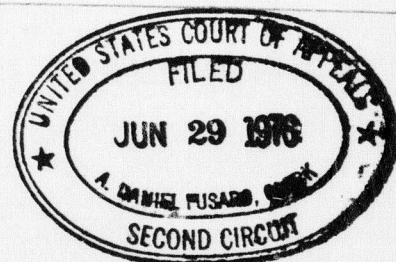
National Labor Relations Board,

Respondent.

B
P/S

Petitioner's Brief And
Appendix

Rose Davis, An
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1. Appendix references are designated as "APP"; Transcript references as "Tr"; Exhibits are designated as "GC Ex" and "R Ex"; Reference to the Administrative Law Judge's Decision are designated as "ALJD"; National Labor Relations Board Decision as "Boards D"; Appropriate page and line designations follow.

INITIAL STATEMENT

The charge in this proceeding was filed by Rose Davis, An Individual, (herein called Davis and Petitioner) on November 7, 1974. On January 31, 1975, a Complaint and Notice of Hearing were served on Caddell-Burns Mfg. Co., Inc. "APP" p. 2)

On February 10, 1975 Caddell-Burns Mfg. Co., Inc., (herein called Caddell-Burns) served its answer to complaint, demanding that the complaint be dismissed. "APP" p. 3)

On February 28, 1975 The National Labor Relations Board, (herein called the Board) issued its Order Amending Complaint. "APP" p. 4

On March 19, 20, 21, 1975 the case came before Administrative Law Judge Sidney J. Barban, based upon an Amended Complaint alleging that Caddell-Burns, Case No. CA-4088, violated Section 8(a)(1) and (3) of the National Labor Relations Act.

On July 23, 1975, Administrative Law Judge Sidney J. Barban issued his Decision wherein he dismissed that part of the complaint which states that

Caddell-Burns violated Section 8(a)(1) and (3) of the Act by:

- (1) Assigning employee Davis to more arduous and less agreeable job tasks, and harassed Davis, thereby forcing her to quit her employment, because of her Union Activities,
- (2) Constructively Discharging Davis,
- (3) Offering severance pay to employees to induce those employees to terminate their employment,

The Judge found that Caddell-Burns violated 8(a)(1) of the Act by:

(1) Advising its employees that wage increases were being withheld because of Union Activities and the pendency of unfair labor practice proceedings;

(2) Promising its employees that such wage increases would be forthcoming when the International Industrial Production Employees Union, (herein called the Union) drive and unfair Labor practices were no longer pending. "APP" p. 5)

Thereafter, the General Counsel and the Petitioner filed exceptions and supporting brief, and Petitioner filed a motion for Rehearing and for a re-opening of the record. "APP" p. 6, 7) p. 8)

On January 20, 1976, the National Labor Relations Board delegated its authority to a three member panel. Whereas two out of the three, decided to affirm the rulings, findings and conclusions of the Administrative Law Judge and to adopt his recommended order. "APP" p. 9)

Statement of Issues For Review

- (1) The Administrative Law Judge erred when he recommended the dismissal of that part of the complaint involving the assignment of Davis to more arduous and less agreeable job tasks, and harassed Davis causing her to quit her employment. "APP" p. 5, "ALJD" p. 2(5) p. 10, 31-35)
- The Board also erred when they agreed with the Administrative Law Judge. "APP" p. 9, Board's D. p. 2-3.)
- The Administrative Law Judge also erred in failing to find in support of the complaint, the assignment of Davis to more arduous job tasks, thereby forcing her to quit her employment. "APP" p. 5, "ALJD" p. 10)
- (2) The Administrative Law Judge erred when he recommended the dismissal of that part of the complaint involving the Constructive Discharge of Davis. "APP" p. 5, "ALJD" p. 2, 6) p. 10)
- The Board also erred when they agreed with the Administrative Law Judge. "APP" p. 9, Board's D. p. 2-3)

(3) The Administrative Law Judge erred in recommending the dismissal of that part of the complaint involving the offering of severance pay to employees. "APP" p. 5, "ALJD" p. 1. 4) p. 2 p 10, 31-32)

● The Board also erred when they agreed with the Administrative Law Judge. "APP" p. 9, Board's D. p. 2.)

● The Administrative Law Judge also erred when failing to find in support of the complaint involving the offer of severance pay to employees. "APP" p. 5, "ALJD" p. 10)

● The Board also erred when denying Davis a Rehearing or a reopening of the record. "so that all of the facts, and evidence, will be stated clearly and without any further prejudice." "APP" p. 9, Board's D. p. 1, 4) Davis motion for Rehearing p. 1-2) and "APP" p. 6 Davis motion for reopening of the record Tardiness p. 3-5) "APP" p. 6, 7)

STATEMENTS OF THE FACTS

Davis began her employment with Caddell-Burns, in the early part of October, 1973. ("APP" p. 5, "ALJD" p. 2, 34-35)

A union drive began on June 3, 1974. ("APP" p. 5, "ALJD" p. 2, 36-37)

Caddell-Burns observed the prominent association of Davis and Loretta Blandon with the union representatives. ("APP" p. 5, "ALJD" p. 2, 37-39)

On June 4, 1974 Blandon was discharge. ("APP" p. 5, "ALJD" p. 2, 39-40)

Davis protested to Caddell-Burns that she, and not Blandon had brought the union in. ("APP" p. 5, "ALJD" p. 2, 40-41)

Employees who had previously shown interest in the union began to withdraw. ("APP" p. 5, "ALJD" p. 2, 41-42)

Soon after, Davis was assigned work on a solder pot in the rear of the shop, only on the hottest days. Davis had performed soldering operations previously but not at the rear soldering pot. "APP" p. 5, "ALJD" p. 5-6, 41-49)

The Administrative Law Judge found no credible evidence that any other employee worked there as much as Davis that summer. "APP" p. 5, "ALJD" p. 6, 14-15)

Another job task assigned to Davis was a cleaning operation, requiring her

to dip her hands into a harmful, irritating cleaning solution, that chemical dissolved rubber gloves which she wore for the purpose, and also irritated her arm. The Judge also found this job task, a task she had never done before.

"APP" p. 5, "ALJD" p. 6, 30-40)

In the last week of Davis' employment, in the first week of November, Thomas Burns assigned Davis the task of winding wire around 500 coils. The Judge found, this was the first time she had performed this operation. ("APP" p. 5, "ALJD" p. 7, 1-5)

Because Davis' production was slow, the next morning, Burns gave one-half of the remaining coils to another,

employee, Mary Rowe, to wind. The Judge found, and the record shows that Rowe was very experienced at such winding operations. "APP" p. 5, "ALJD" p. 7, 10-13)

Later in the day, Burns confronted Davis with the coils which had been done by Rowe, suggesting, "maybe you don't belong working here." "APP" p. 5, "ALJD" p. 7, 13-20)

The Judge found that Burns' testimony concerning his purpose in creating the confrontation was something less than persuasive. "APP" p. 5, "ALJD" p. 7, 23-24), the Judge also did not credit Burns' testimony as to his reason for comparison timing of Davis. "APP" p. 5, "ALJD" p. 7, 25-35)

On October 16, 17, 1974, Davis attended a hearing before an Administrative Law Judge of the Board, as a prospective witness, upon a complaint for the discriminatory discharge of Loretta Blandon. "APP" p. 5, "ALJD" p. 3, 24-26)

At the point, when Blandon's case appeared settled, Burns' Attorney David Goldberg, stated that they might now, "take care of Davis". "APP" p. 5, "ALJD" p. 3, 27-29)

At the suggestion of the Judge the discussion was adjourned to another room. "APP" p. 5, "ALJD" p. 3, 29-30)

There Burns' Attorney told Davis that Caddell-Burns did not want her "there" and asked "What will it take for you not to go back to work". Counsel suggested that Burns would give her 2 weeks pay, and get her another job. Davis refused to offer.

"APP" p. 5, "ALJD" p. 3, 31-35)

Furthermore, after the advent of the Union, Davis was threatened with discharge for the first time, if she did not come in on time to work. Whereas before the Union, Caddell-Burns condoned lateness, but did not reprimand her. "APP" p. 5, "ALJD" p. 7, 43-45, p. 8-12

ARGUMENTS

POINT I

Burns' had Knowledge of Davis' Union Activities, It was undisputed that Davis notified them on June 5, 1974 that she was the one who called in the union, and also, Davis appeared at Blandon's hearing prepared to testify for the General Counsel.

Point II

After the advent of the Union, Burns' told the employees because "The union is here" no one can get a raise. Later on.

the employees were told that wage raises would not be given because of the unfair labor practice proceeding, instituted on behalf of employee Blandon. "APP" p. 5, "ALJD" p. 8, 13-2

Across-the-board increases were given on November 20, 1974, one week after Davis' forced resignation.

Point III Inducement To Quit

Judge Barbahn found that Burns' Attorney offered Davis money at the Blandon hearing, and advised Davis that Burns' did not want her to continue work.

However, the Judge stated, the offer was made only after the Union Representative informed counsel that Davis was unhappy at her work and it would be in the best interest of Davis if she quit. "APP" p. 5, "ALJD" p. 9, 11

There is nothing in the record that substantiates that the Union representative made any such offer to David Goldberg, Burns' Attorney. There is only the word of David Goldberg!

Judge Barbam found upon the testimony of Davis, and the corroborating testimony of Blandon, that:

- (1) It was David Goldberg who raised the issue in the Board's own hearing room, before an Administrative Law Judge, about taking care of Davis. "APP" p. 5, "ALJD" p. 3, 25-35

(2) It was David Goldberg who suggested that Burns would give Davis 2 weeks pay.

"APP" p. 5, "ALJD" p. 3, 33-34)

(3) When David Goldberg and Davis passed Sidney Burns Company's President, and Catherine Gianetti standing together, Gianetti stated, she did not want Davis back at work, counsel stated, He had done all he can, there was nothing more that he could do. "APP" p. 5, "ALJD" p. 3, 36, p. 4, 1-5)

(4) It was David Goldberg who approached Davis and Blandon, at Chock Full of Nuts Cafeteria on October 17, 1974, to asked Davis, if she changed her mind. "APP" p. 5, "ALJD" p. 4, 5-7)

At this time I would like to direct the attention of the Court to read the sworn testimony of attorney David Goldberg. ("APP" p. 10, "Tr" p. 351-362)

Point IV The Constructive Discharge

- The Board states, "there is nothing in the record which would show that Davis was unlawfully singled out." ("APP" p. 9, Board's Dp. 2)

Davis was to perform soldering in extremely hot weather, and also to work on cleaning transformer parts in a harmful chemical solution. Judge Barban found that these assignments were to be performed under conditions that were "oppressive". ("APP" p. 5, "ALJD" p. 9, 11-20)

Her complaints about these assignments were completely ignored, while other employees were so reassigned.

Thomas Burns who done, a time and motion study on Davis in comparison with the entire management team, 2 other employees and a floor sweeper. No similar comparison was made of any other employee. "APP" p. 11, "Tr" p. 299-303, Cross examination line 22 to line 11, p. 303)

It is also clear that all these things were being done to Davis to get her to quit, not because they did not like her personally, but because she brought in the Union, as it is evident when Burns' sought to rid itself of Davis through its offer of

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CERTIFICATE OF SERVICE

The undersigned certifies that one copy of Brief and Appendix in the above case has this day been served by registered mail upon the following party, at the address listed below:

/s/ Elliott Moore
Deputy Associate General
Counsel
National Labor Relations Board
Washington, D. C. 20570

Dated:
June 25, 1976

Rose Davis
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11550

money to her on October 16, 1974 at the Blandon hearing and furthermore, when that failed as found by Judge Barham, Burns' provoked such a hostile, and somewhat childish confrontation with Davis. "APP" p. 5, "ALJD" p. 9, 37-41

CONCLUSION

Davis was constructively discharged as discussed in this Brief, It is further clear that the employer retaliated against its employees as found by the Judge, that some friends of Davis indicated that they were concerned about associating with her for fear of losing their jobs. "APP" p. 5, "ALJD" p. 3, 1/5) Also its union animus was clearly demonstrated by its threats to withhold wage increases,

and to tell the employees as long as "the union is here, no one can get a raise".

More so by its' offer of money to get one of its' employees to quit, when she appeared as a prospective witness against them, at an alleged unlawful discharge hearing.

Thus it is clear as stated by Howard Jenkins, Jr., member of the board. "APP" p. 9, Boards Dp. 4, p. 4-6) That Caddell-Burns violated section 8 (a) (1) and 3 of the Act in all respects as alleged in the Amended Complaint.

JUN. 25 1978

Respectfully Submitted,
Rose Davis